



OFFICE OF PUBLIC INSTRUCTION

PO BOX 202501
HELENA MT 59620-2501
www.opi.mt.gov
(406) 444-3095
(888) 231-9393
(406) 444-0169 (TTY)

Denise Juneau
Superintendent

January 16, 2009

[Complainants]

[Superintendent of District]

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT In the Matter of ** 2008-05** alleging violations of the Individuals with Disabilities In Education Act (IDEA)

Dear [Complainants] and Superintendent ****,

This is the Final Report pertaining to the above-referenced state special education complaint ("Complaint") filed pursuant to Admin.R.Mont. 10.16.3662. **** ("Complainants"), parents of ** ("Student"), allege that **** School District ("District") failed to provide a free and appropriate public education (FAPE) under the Individual's with Disabilities Education Act (IDEA) and Montana special education laws.

Specifically, Complainants allege:

1. That the District failed to adequately implement **'s Individualized Education Plan (IEP) with respect to speech services called for in the IEP in violation of the IDEA.
2. Complainants also assert that testing and IQ scores determined by the District are not accurate but rather the scores determined by their child's private therapist are accurate.

A. Procedural History

1. The Complaint. On October 17, 2008, the Montana Office of Public Instruction (OPI) received a Complaint signed by Complainants dated October 14, 2008.

2. Early Assistance Program. The OPI's Early Assistance Program provided a copy of the Complaint to the District and attempted to resolve the controversy pursuant to Admin. R. Mont. 10.16.3660. The Director of the Early Assistance Program concluded that resolution was not possible.

3. District's Written Response. On November 13, 2008, OPI sent a letter to the parties requiring a written response from the District. On November 21, 2008 OPI sent a letter further qualifying the documentation needed with the Response. The District's response was received by the OPI December 2, 2008.

4. Complainants' Reply. On December 8, 2008, OPI sent a letter to Complainants requesting a reply to the District's written response by December 24, 2008. Complainants requested and received an extension to January 6, 2009 to file a reply. Complainants filed their Reply January 6, 2009.

5. Extension of Time In Which To File Final Report. On December 23, 2008, Compliance Officer Harris issued an extension of time in which to file a Final Report to January 16, 2009.

The findings and conclusions contained in the Final Report are based on the Complaint, the District's Written Response and supplements, Complainant's Reply, and discussions with the parties. Federal and state laws require all relevant information to be reviewed and an independent determination made as to whether the District violated IDEA and state law. A staff investigator was appointed as part of this investigation.

B. Legal Framework

Federal and state law requires that students with disabilities receive a free and appropriate public education. 20 U.S.C. §§1400-1487; Mont. Code Ann. §20-7-401 et seq. In general, FAPE means special education and related services that conform to the student's individualized education program. Special education, in turn, means specifically designed instruction, at no cost to the parent, to meet the unique needs of the child with a disability. *Board of Education or Hendrick Hudson Cent. School District, Westchester County v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). "One of the IDEA's most important mechanisms for achieving [its] lofty goals is the formulation and implementation of IEPs." *Van Duyn v. Baker School District 5J*, 502 F. 3d 811, 818 (9th Cir. 2007).

C. Findings and Conclusions

1. This Office has jurisdiction to investigate alleged violations of the IDEA and state special education law occurring within one year prior to the filing date of October 17, 2008.
2. During the 2007-2008 school year, the Student was a six year old first-grader who received special education services from the District.
3. The Student received services for one year pursuant to an IEP dated 12-12-06. That IEP called for speech therapy services twice a week for one-half hour in a special education setting. This 2006-2007 IEP was in effect during

the October 17, 2007 to December 18, 2007 period pertinent to this Complaint.

4. The Student continued to receive services pursuant to a subsequent IEP for the 2007-2008 school year dated 12-19-07. That IEP called for one-half hour per week of speech therapy services in a regular classroom setting and one-half hour of speech therapy service per week in a resource setting.
5. On May 21, 2008, a child study team (CST) met and determined that the Student no longer needed special education services. The CST relied on, among other things, test scores and observation of the Student.
6. On May 21, 2008, the CST found the Student's speech and language communication skills to be "beyond the skills of virtually all his peers" and that he was doing exceptionally well. All CST participants, including Complainants, agreed to exit the Student from services.
7. The District Response to this Complaint included a "continuous log" regarding speech services provided to the Student. Therapy times were either recorded with the date or "generally occurred in the 12:45 to 1:15 time frame."
8. Complainants' Reply asserts that they do not believe the log is accurate. No support for this assertion was submitted.
9. For purposes of this Complaint, the 2006-2007 IEP was applicable to the ten week period from October 15, 2007 through December 21, 2007.
10. For this ten week period, the "continuous log" lists 7 speech therapy sessions lasting one-half hour and 1 session lasting three-quarters of an hour (the equivalent of 8 ½ sessions). The location of sessions was not always clearly delineated.
11. For this ten week period, the speech therapist was listed as absent two of the ten weeks. (equivalent of 4 sessions missed).
12. During this ten week period, no speech therapy sessions were reported during the week in which "Hearing and Vision screening" took place. (equivalent of 2 sessions missed).
13. During this ten week period, the school was closed for a portion of Thanksgiving week (generally three days) and no services were reported on the two remaining days. (one session missed).
14. In addition, during this ten week period, the Student was absent two of the weeks. (four sessions missed).
15. The total number of half hour sessions of speech services required during the 2006-2007 IEP from October 16, 2007 to December 21, 2007 is 19 minus the 4 missed by the student for a total of 15 sessions. The "continuous log" reports that services equivalent to 8.5 sessions were provided indicating that 6 and one-half sessions were missed for that period.
16. The 2007-2008 IEP contained 21 weeks from January 3 to May 21, 2008 after which time the Student no longer had an IEP.
17. The therapist was absent for 2 weeks during which no speech services were provided.

18. The school was closed for all or portions of two weeks for parent teacher conferences and spring break. (42 sessions minus 4 sessions=38)
19. The week of May 21, 2008 the CST was held and no services were provided.
20. The District's "continuous log" reports a total of 7 hours or the equivalent of 14 sessions of speech services were provided during the 2007-2008 IEP period. (38-14 sessions = 24 missed sessions)
21. All told, the District did not provide services for at least 30 speech therapy sessions which it was obligated to provide under the provisions of these two IEPs.
22. By May 21, 2008, the District had tested and determined IQ scores for the Student. The parties discussed the scores at the May 21, 2008 CST meeting and all parties agreed the Student no longer needed special education services.
23. In 2007, an IQ score had been determined by the Student's private clinician which was lower than the scores determined by the District in May, 2008.

D. Analysis and Conclusions of Law

- I. Did the District violate the IDEA when it failed to provide all of the agreed-upon speech services in Student's IEP?

Complainants argue that the District violated the IDEA when it failed to provide all of the speech services agreed upon in their child's IEPs. The information presented by the District records essentially 4 explanations or scenarios for why the Student did not receive speech services during a given week: a) absence of the Student; b) school closures for holidays or various school-related reasons; c) absence or unavailability of the therapist/teacher; d) no services provided and no explanation provided.

The IDEA does not specifically address "make-up" services for services delineated in an IEP nor is every technical failure to implement an IEP considered to be a violation of the IDEA. We reference Office of Special Education Program (OSEP) guidance and federal circuit court precedents in interpreting this issue.

A. Student's Absence.

Regarding the absence of the Student for illness or other unspecified family decision, the general rule is that if a district makes IEP services available to the student at the normally scheduled time, the district is not obligated to make other arrangements to provide services. *OSEP Letter to Balkman, Apr. 10, 1995; OSEP Letter to Copenhagen, Mar. 11, 2008*. Here, the Student's absence of two weeks (fall of 2007) would generally be regarded as de minimis and would not require make-up services.

B. School Closure in the Normal Course of the School Year.

With regard to school closures for holidays, parent-teacher conferences, and other school-wide activities, no services would have been anticipated by the IEP team during these regularly scheduled events. Therefore no make-up time is called for.

C. Absence or Unavailability of the Therapist

If speech therapy sessions are not held due to the absence of the therapist from the classroom, the district is considered to "not have made the service available at the regularly scheduled time" as required. *OSEP Letter to Balkman, supra*. Thus, this District has the responsibility to provide these services at another time to meet its responsibilities to provide a free and appropriate public education. Further, OSEP encourages districts to consider the impact of a provider's absence or a child's absence on the child's progress and performance and determine how to ensure the continued provision of FAPE in order for the child to continue to progress and meet the annual goals in his or her IEP. *OSEP Letter to Clarke, Mar. 8, 2007*.

D. Failure To Provide Speech Services-No Explanation Provided

The District provided no particular explanation for its failure to provide speech therapy services with regard to the majority of the missed sessions. During the period pertinent to the 2006-2007 IEP in the fall of 2007, the District failed to provide at least six speech therapy sessions. During the period pertinent to the 2007-2008 IEP from January through May, 2008, the District failed to provide approximately twenty-four required speech therapy sessions. During the period relevant to this complaint, the District performed at least 30 fewer speech therapy sessions with this Student than were called for in the Student's IEPs.¹

The issue becomes whether the Student was denied a Free and Appropriate Public Education under the IDEA as a result of the District's failures to fully implement the services agreed upon in the IEP. Whether an "interruption" in services constitutes a denial of FAPE is an individual determination that must be made on a case-by-case basis. *OSEP Letter to Clarke, Mar. 8, 2007*.

Several federal appellate courts have addressed this issue of a district's IEP implementation failures. The Fifth Circuit addressed IEP implementation issues in *Houston Indep. School District. v. Bobby R.*, 200 F. 3d 341 (5th Cir. 2000), holding that de minimis failures to implement an IEP do not amount to a violation of the IDEA, but rather that the statute is violated only where it is demonstrated that a district failed to implement "substantial" or "significant" IEP provisions. *Id.* at 349.

¹ We start with 21 weeks=21 hours= 42 sessions. FOF# 17 requires a teacher to make up the 4 missed sessions. (42-0=42). FOF#18 does not require 4 of those sessions to be made up. (42-4= 38). FOF#19 there appears to be no reasonable explanation as to why services should not be provided during a week when the CST meeting is held. (38-0=38) FOF#20 The log reports 7 hrs or 14 sessions were provided. (38-14= 24) Thus the District failed to provide 24 sessions from the 2007-2008 IEP. The total sessions missed without appropriate make-up or reason during the applicable timeframe was 30- 6 from the 06-07 IEP and 24 from the 07-08 IEP.

Employing this standard, the Fifth Circuit concluded that conceded implementation failures did not violate the IDEA because the significant provisions of the student's IEP were followed, and as a result, he received an educational benefit. *Id.*

Similarly, the Eighth Circuit in *Neosho R-V School District v. Clark*, 315 F. 3d 1022 (8th Cir. 2003), held that the IDEA is violated "if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit. *Id.* at 1027.

In 2007, our Ninth Circuit likewise addressed IEP implementation failures. The court held that the standard for evaluating alleged IEP implementation failures is whether or not the failure is a material failure. *Van Duyn v. Baker School District 5J*, 502 F. 3d 811, 822 (9th Cir. 2007) 47 IDELR 182 (*amended version*). It held that "[t]here is no statutory requirement of perfect adherence to the IEP nor any reason noted in the statutory text to view minor implementation failures as denials of FAPE. *Id.* at 821. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. *Id.* at 822. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. *Id.*

Thus, if the District's implementation failures caused a pronounced impact on the student's performance, this could demonstrate material failure and a failure to receive educational benefit. We examine whether the District's failures in this case were material discrepancies in services. We analyze whether the significant provisions of the Student's IEP were followed such that the child received an educational benefit.

The District argues that it provided the Student with an "appropriate level of services" and that the Student was successfully exited from special education services at the end of the school year. The District does not deny that it failed to provide numerous agreed upon speech therapy sessions to the Student nor does it explain these failures.

On the other hand, Complainants do not argue that the Student failed to receive educational benefit nor do they appear to argue that the results of the District's implementation failures somehow significantly or materially impacted their child's educational experience at the District. Their concerns center around the technical "track record" of implementation failures that make up this case and appear to be directed to anticipated future interactions with the district in which such failures could be repeated.

The May 21, 2008 Child Study Team records lauded the Student's improved speech/language communication skills as "beyond the skills of virtually all his peers", "doing great", "gives great information", and "is shining and doing well socially." By the end of the 2007-2008 school-year, the Student was performing so well in all areas that speech therapy, communication skills, and other areas targeted by the IEPs were found to be improved to such a degree that special education services were no longer needed.

On May 21, 2008, Complainants and other members of the IEP/CST team unanimously agreed to exit the Student from special education services. This Student was performing at or above the anticipated level and his educational progress was not impeded. Given this hindsight, failure to implement the not insignificant number of speech therapy services cannot be said to be a material failure to provide FAPE under the unique facts of this case. No material failure exists and no violation of the IDEA is found.

This is not to say that in many, if not most situations, failure to implement roughly half of the agreed-upon services could constitute a material failure. Another factor which could be going on is that the service may no longer be needed. However, if a service is deemed to be no longer needed, the IDEA prescribes methods to make IEP changes. Obviously an IEP team is responsible for the continued updating and corrections to an IEP to ensure it remains individually tailored to the particular needs of the child. In this case, the District's assertion that the actual level of speech services provided to this student was "an appropriate level of service" is in contradiction to its' IEP position that a higher level of services was appropriate for this Student. It is clear that the District at some point decided to unilaterally change the IEP on its own. It had no authority to do so.

I would reiterate the Ninth Circuit's caution that IEPs are binding under the IDEA and the District is obligated to provide services "in conformity with" the child's IEP. *VanDuyn, supra* at 822. "...[T]he proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statutes—not to decide on its own no longer to implement part or all of the IEP." *Id.* See 20 U.S.C. §§1414 (d)(3)(F) and -1415(b)(3).

Because the District's explanation for the significant IEP implementation failures is simply that they were providing an "appropriate level of services", further emphasis on IDEA procedural requirements is necessary. Under the supervisory powers of this Office, I order the District to review and comply with the procedural requirements of 34 CFR §§300.320 - 300.328 and 300.500- to 300.537 as they may relate to Complainants or others to whom services are to be provided. 34 CFR §300.149 (supervisory powers); *O'Toole v. Olathe USD, 28 IDELR 177 (1998)*

- II. Did the District violate the IDEA because the District's May 2008 testing and determination of Student's IQ score were less accurate than the score produced by the child's private therapist in 2007?

Complainants raised this issue in the Complaint but did not challenge the District at the time of the determination by requesting an Independent Educational Evaluation 34 CFR §300.502. The parties discussed various testing and scoring but Complainants and the rest of the team members unanimously agreed to exit the Student from services based on all the information. Because the Student no longer needed services, this issue is now moot. Should the Student need services in the future, Complainants retain the right to timely challenge pertinent determinations through the procedural mechanisms available under the IDEA and Montana law.

E. Disposition

No material violations of the IEP are found. This Complaint is DENIED.

However, pursuant to the supervisory powers of this Office, the District is ORDERED to prospectively review and comply with the procedural requirements of 34 CFR §§300.320 - 300.328 and §§300.500- to 300.537 in the provision of its IEP special education services.

Sincerely,

Tim Harris, Compliance Officer
OPI Special Education Director